

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DEAN WOODWORTH,

Defendant-Appellant.

UNPUBLISHED
June 13, 2013

No. 301619
Oakland Circuit Court
LC No. 2010-231059-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMANTHA LORRAINE LOMASNEY,

Defendant-Appellant.

No. 301620
Oakland Circuit Court
LC No. 2010-231058-FC

Before: M. J. KELLY, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

These consolidated appeals arise from a joint trial of co-defendants James Woodworth and Samantha Lomasney, before separate juries. Defendant Woodworth's jury convicted him of first-degree felony murder, MCL 750.316(1)(b), and unarmed robbery, MCL 750.530, for which he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of life without parole for the murder conviction, and 19 to 50 years for the robbery conviction. Defendant Lomasney's jury convicted her of first-degree felony murder, unarmed robbery, and operating a motor vehicle without a license and causing the death of another person, MCL 257.904(4). The trial court sentenced Lomasney to concurrent prison terms of life without parole for the murder conviction, and 86 months to 15 years for the robbery and operating without a license convictions. Woodworth appeals as of right in Docket No. 301619, and Lomasney appeals as of right in Docket No. 301620. We affirm in both appeals.

I. BASIC FACTS

Defendants' convictions arise from the January 2010 death of Greg Wainio, while he worked as a loss prevention associate at a Waterford Township Kmart store. Wainio was killed when he tried to stop Woodworth's theft of property from the store. Wainio pursued Woodworth into a waiting SUV that was parked near the front of the store. Wainio partially entered the SUV and struggled with Woodworth. The driver, Lomasney, drove off rapidly after Woodworth repeatedly instructed her to "go." Wainio's body was dragged approximately 220 feet before being dislodged from the SUV after striking at least one pillar in front of the store. Wainio died from injuries received during the incident.

II. SUFFICIENCY OF THE EVIDENCE

Defendants initially protest the sufficiency of the evidence concerning the malice element necessary to sustain their felony-murder convictions. We review a defendant's challenge to the sufficiency of the evidence de novo. *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). However, we do not interfere with the factfinder's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Circumstantial evidence and the reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). We resolve all conflicts in the evidence in favor of the prosecution. *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008).

A. FELONY MURDER

A conviction of felony murder requires proof of the following elements:

(1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or *to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result (i.e., malice)*, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in [MCL 750.316(1)(b).] [*People v Carines*, 460 Mich 750, 758-759; 597 NW2d 130 (1999) (emphasis added, internal quotations and citation omitted).]

"A jury may infer malice from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm." *Id.* at 759. Further, in the context of sufficiency of the evidence, intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163

Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Fennel*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004).

1. DEFENDANT WOODWORTH

Viewed in a light most favorable to the prosecution, ample evidence was presented to prove beyond a reasonable doubt that Woodworth possessed the state of mind necessary to sustain his felony-murder conviction. Woodworth told Lomasney to wait near the front doors of the Kmart store for him to depart the store with stolen property. Woodworth ran outside to the passenger side of the SUV that was waiting at the front doors. According to the store manager, Woodworth struggled with Wainio when Wainio pursued Woodworth to the SUV and partially entered the SUV's front passenger door. The testimony of Lomasney and multiple eyewitnesses established that Woodworth then yelled at Lomasney to "go," a command that Woodworth repeated when Lomasney hesitated and removed her foot from the accelerator. The fleeing SUV subsequently dragged Wainio approximately 220 feet from the store's front doors, inflicting Wainio's fatal injuries. In conclusion, a rational jury could have found beyond a reasonable doubt that, by repeatedly urging Lomasney to flee from the store while knowing that Wainio was partially inside the SUV or very near the SUV's passenger side, Woodworth intentionally placed in motion a force that likely would cause death or great bodily harm. *Carines*, 460 Mich at 758-759.

2. DEFENDANT LOMASNEY

When viewed in the light most favorable to the prosecution, the evidence also was sufficient to prove beyond a reasonable doubt that Lomasney possessed the state of mind necessary to sustain her felony-murder conviction. After Woodworth left the store and got inside the SUV's passenger side, Lomasney acknowledged seeing Wainio place himself between the passenger door and the SUV. Although Lomasney testified that she lifted her foot off the SUV's gas pedal, she further explained that Woodworth's command to "go" prompted her to replace her foot on the accelerator. She did not dispute that she continued speeding out of the parking lot at speeds between 39 miles an hour and 46 miles an hour, or that the SUV dragged Wainio's body approximately 220 feet from the store's front doors. Lomasney's conduct in accelerating away from the store, notwithstanding Wainio's presence in or very near the SUV, gave rise to a reasonable inference that she intentionally placed in motion a force likely to kill Wainio or cause him great bodily harm. *Carines*, 460 Mich at 758-759.

B. UNARMED ROBBERY—DEFENDANT WOODWORTH

Woodworth raises another challenge to the sufficiency of the evidence, specifically that no evidence showed that he had taken the CD's "directly from Mr. Wainio," or that he had employed "force or violence against [Wainio] to retain possession of the CDs" he took from the store. The unarmed robbery statute, MCL 750.530, provides:

- (1) A person who, *in the course of committing a larceny* of any money or other property that may be the subject of larceny, *uses force or violence against*

any person who is present, or who assaults or puts the person in fear, is guilty of a felony punishable by imprisonment for not more than 15 years.

(2) As used in this section, “*in the course of committing a larceny*” includes acts that occur in an attempt to commit the larceny, or during commission of the larceny, or *in flight* or attempted flight *after the commission of the larceny*, or in an attempt to retain possession of the property. [Emphasis added.]

An unarmed robbery conviction requires proof that the defendant (1) feloniously took another’s property, (2) “by force or violence or assault or putting in fear,” and (3) he was unarmed. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010).

Contrary to Woodworth’s suggestion, the unarmed robbery statute does not require that the defendant have taken property “directly from” the person against whom force or violence was used. It merely requires that a larceny have occurred, and that force or violence was used “against any person who is present.” Also contrary to Woodworth’s contention, the store manager testified that she saw the theft suspect jump into the passenger side of a red SUV that was parked in the fire lane in front of the double doors. She observed Wainio run to the SUV, reach inside the vehicle, and engage in a short struggle with the theft suspect. Viewed in the light most favorable to the prosecution, the store manager’s testimony supports a rational determination by Woodworth’s jury that he used force against Wainio “in flight . . . after the commission of the larceny, or in an attempt to retain possession of the property.” MCL 750.530(2); *People v Passage*, 277 Mich App 175, 178; 743 NW2d 746 (2007) (observing that the statute’s plain language “punishes a defendant for using force or violence . . . [or] committing an assault . . . during flight . . . after the larceny was committed,” and “the use of any force against a person during the course of committing a larceny, which includes the period of flight, is sufficient under the statute”).

III. INSTRUCTIONAL ERROR—DEFENDANT WOODWORTH

Woodworth further argues that the trial court erred in declining to instruct the jury regarding contributory negligence of Wainio, as contemplated in CJI2d 16.20. This Court generally considers de novo claims of instructional error. *People v Bartlett*, 231 Mich App 139, 143; 585 NW2d 341 (1998). We review “for an abuse of discretion a trial court’s determination that a specific instruction is inapplicable given the facts of the case.” *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011).

“A criminal defendant has the right to have a properly instructed jury consider the evidence against him.” *People v Rodriguez*, 463 Mich 466, 472; 620 NW2d 13 (2000). We review jury instructions as a whole to determine whether error requiring reversal occurred. *Bartlett*, 231 Mich App at 143. The jury instructions must include all elements of the charged offenses, and must not omit material issues, defenses and theories that the evidence supports. *Id.* Even when somewhat imperfect, jury instructions do not qualify as erroneous provided that they fairly present to the jury the issues to be tried and sufficiently protect the defendant’s rights. *People v Knapp*, 244 Mich App 361, 376; 624 NW2d 227 (2001); *Bartlett*, 231 Mich App at 143.

CJI2d 16.20 provides:

If you find that [the deceased] was negligent, you may only consider that negligence in deciding whether the defendant's conduct was a substantial cause of the accident.

The trial court deemed this instruction inapplicable on the basis of *People v Werner*, 254 Mich App 528, 541; 659 NW2d 688 (2002), in which this Court noted that a defendant facing a negligent homicide charge may “introduce evidence that the decedent was . . . [negligent] at the time of the accident, provided the evidence was used only for the issue of causation, and not as a defense to criminal conduct.” The Court restated the principle that “contributory negligence is not a viable defense to a homicide charge.” *Werner*, 254 Mich App at 540; see also CJI2d 16.20 use note and commentary. The Court in *Werner* explained the distinction between the relevance of a decedent's negligence to charges of second-degree murder and negligent homicide:

[W]e do not believe that the holding in [*People v Moore*, 246 Mich App 172; 631 NW2d 779 (2001), concerning negligent homicide,] applies to second-degree murder cases. Negligent homicide requires proof that the defendant's conduct was a “substantial” cause of the victim's death. The issue of proximate cause is thus relevant to the defendant's criminal liability. However, in *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996), our Supreme Court applied a different proximate cause analysis in a voluntary manslaughter case:

In assessing criminal liability for some harm, it is not necessary that the party convicted of a crime be the sole cause of that harm, only that he be a contributory cause that was a substantial factor in producing the harm. The criminal law does not require that there be but one proximate cause of harm found. Quite the contrary, all acts that proximately cause the harm are recognized by the law. [*Id.* at 676.]

The Court explained that “[w]here an independent act of a third party intervenes between the act of a criminal defendant and the harm to a victim, that act may only serve to cut off the defendant's criminal liability where the intervening act is the sole cause of harm.” *Id.* at 677, 549 NW2d 325.

Under *Bailey*, evidence of the decedent's failure to use a seat belt [contributory negligence] would be relevant only where the defendant could show that the failure was the sole cause of the harm to the decedent. *Bailey* involved voluntary manslaughter, which is more akin to second-degree murder than negligent homicide. Indeed the statutory scheme provides a clear demarcation between second-degree murder and negligent homicide. The latter statute specifically excludes wilful and wanton conduct as a basis for a negligent homicide charge. Accordingly, we conclude that *Bailey* applies to the instant case, and the trial court properly excluded the evidence of the decedent's failure to wear a seat belt. [*Werner*, 254 Mich App at 543 (emphasis added; citation omitted).]

Because the trial court in this case instructed Woodworth's jury with respect to the lesser offenses of negligent homicide and involuntary manslaughter, any alleged negligence of Wainio could have had relevance to the causation element of these lesser charges. *Werner*, 254 Mich App at 541-542. However, even with respect to the lesser charges, Wainio's conduct would have had relevance to causation only if the evidence showed that his "death [wa]s so remote from the defendant's conduct that it would be unjust to permit conviction." *Id.* at 541 (internal quotation and citation omitted). Here, as in *Werner*, 254 Mich App at 542, Wainio's death "was not remote from the collision[.]" which was caused by the conduct of defendants. Wainio sustained injuries as a direct result of Woodworth's instruction to Lomasney to "go" and Lomasney's operation of the SUV. Thus, even with respect to the lesser charges, we find that the trial court did not abuse its discretion in declining to give the requested instruction.

Moreover, in light of the evidence of Woodworth's malice and the jury's verdict finding him guilty of first-degree felony murder, the holdings in *Werner* and *Bailey* dictate that Wainio's purported contributory negligence would have relevance only if Woodworth could show that Wainio's negligence constituted "the sole cause of harm" to Wainio. Because the record does not give rise to a reasonable inference of any negligence by Wainio that could qualify as the sole cause of his death, the trial court acted within its discretion when it declined to give CJI2d 16.20. *Hartuniewicz*, 294 Mich App at 242.

IV. ADDITIONAL CLAIMS OF ERROR—DEFENDANT LOMASNEY

A. JUROR MISCONDUCT

Lomasney maintains her entitlement to a new trial on the basis of juror misconduct, citing MCR 2.611(A)(1). We generally review for an abuse of discretion a trial court's ruling on a motion for a new trial. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000), overruled in part on other grounds in *People v Miller*, 482 Mich 540, 561 n 26; 759 NW2d 850 (2008). However, although Lomasney placed her objection to a juror's alleged misconduct on the record during the proceedings, she failed to move the trial court for a new trial on this ground. We therefore consider her claim of juror misconduct to determine whether any plain error affected her substantial rights. *Carines*, 460 Mich at 763.

This Court in *People v Fetterley*, 229 Mich App 511, 544-545; 583 NW2d 199 (1998), recited the following principles governing juror misconduct considerations:

(I)t is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice. [Internal quotation and citation omitted.]

See also *People v Dunigan*, ___ Mich App ___, ___ NW2d ___ (Docket No. 306654, issued February 26, 2013), slip op at 3 (summarizing the prejudice requirement necessary to support a claim of juror misconduct).

The record reflects that at approximately 2:00 p.m. on the fifth day of testimony, the trial court, acting sua sponte, recessed the proceedings to question a juror who seemingly had difficulty with his capacity “to remain with us.” The court initially explained that during the morning session, the court clerks had passed the court a note that prompted it to observe the juror, who “got past the issue.” The court added that the issue had recurred that afternoon “to the extent that the[] [clerks] noticed it again.” The juror advised the court that his blood pressure and diuretic medications tended to keep him awake at night repeatedly “go[ing] to the restroom.” The court elicited the juror’s understanding of the importance of staying “awake and listening to the evidence that’s presented,” his agreement that he would place himself at the end of a jury bench and “stand up . . . [and] go walk up to the wall” if he felt sleepy again, and his assertion that he felt fine. Lomasney’s trial counsel later moved to dismiss the juror and replace him with an alternate juror, which the court denied.

Our review of the record reflects that on a single day of trial the juror nodded his head during the morning session, closed his eyes in the afternoon and “napp[ed] for a minute or two,” but did not miss important testimony. The trial court expressed that it and the court staff would maintain observance of the juror, and the record does not suggest that the juror thereafter experienced any moments of inattention. Because the record supports the trial court’s findings that Lomasney did not endure substantial harm arising from the juror’s brief moments of inattention, we conclude that the court acted within its discretion when it denied her motion to replace the juror. *Dunigan*, slip op at 3 (denying the defendant’s motion for a new trial on the basis of juror misconduct, given that “[t]he trial court properly admonished the [sleeping] juror,” the record did not substantiate “what, if any, testimony the juror missed,” and the “defendant fail[ed] to articulate how he was prejudiced”). Therefore, plain error affecting Lomasney’s substantial rights did not occur. *Carines*, 460 Mich at 763.

B. EXPERT TESTIMONY

Lomasney complains that the trial court mistakenly certified Waterford Township police officer Stanley Mathewson as an accident reconstruction expert because he lacked any experience in this area and he conceded that he had not taken into account all of the relevant evidence surrounding the accident. An appellate court “reviews a trial court’s rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion.” *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006). An appellate court also reviews for an abuse of discretion a trial court’s decision whether to admit evidence. *Surman v Surman*, 277 Mich App 287, 304-305; 745 NW2d 802 (2007). An abuse of discretion occurs when a trial court selects an outcome falling outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). To the extent that this Court’s review of an evidentiary issue “requires interpretation of the Michigan Rules of Evidence, an issue of law is presented, which this Court reviews de novo.” *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience,

training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Mathewson testified that he worked as a road patrol officer for the Waterford Township police, with “secondary responsibilities . . . [that] include[d] accident investigation . . . [and] accident reconstruction.” Mathewson recalled that before his placement “on the accident investigation unit,” he went through “several accident investigation courses including accident reconstruction.”¹ Mathewson believed that since 2004, he had “investigated hundreds of accidents, from minor property damage accidents” to fatal injury accidents. He specified that he had participated in investigating “at least 20 serious injury or fatal accidents.” Mathewson described accident reconstruction as “determin[ing] speeds of vehicles” “from angles of impact, angles of departure,” and by applying other scientific principles to the information gathered during an accident scene investigation. Mathewson acknowledged that “[t]his would be my first case that I’ve reconstructed outside of accident reconstruction school.” Regarding Mathewson’s accident reconstruction in this case, he contacted a “very well respected” state police officer who had performed accident reconstruction work “for a very, very long time,” “explained to him the case, told him how I was looking at approaching th[is] accident reconstruction,” and the officer confirmed “that what [Mathewson] was doing was correct.”

Lomasney disputes only the extent of Mathewson’s qualifications, emphasizing his lack of accident reconstruction experience. However, the language of MRE 702 contemplates that “a witness qualified as an expert by knowledge, skill, experience, *training, or education* may testify” regarding his “scientific, technical, or other specialized knowledge.” (Emphasis added). Mathewson’s lack of field experience in accident reconstruction did not render him unqualified to testify, given that the plain language of the rule authorizes other avenues of qualification. Because Mathewson discussed at trial his education and training in accident reconstruction, the trial court acted within its discretion when it qualified him to give expert testimony in this area, notwithstanding Mathewson’s lack of experience. *Surman*, 277 Mich App at 304-305. “The extent of a witness’s expertise is usually for the jury to decide,” and “[g]aps or weaknesses in the witness’ expertise are a fit subject for cross-examination, and go to the weight of his testimony, not its admissibility.” *Id.* at 309-310 (internal quotation and citation omitted).

Lomasney also argues that the trial court improperly admitted a misleading animation exhibit that Mathewson prepared. The prosecutor moved to admit a two-dimensional animation of the accident that Mathewson had prepared using the measurements made by investigators at the scene, his speed range calculations, and some information reported by “the witnesses at the

¹ Mathewson elaborated that he had successfully completed several courses at Michigan State University, including “Accident Investigation 9, which is accident reconstruction,” “Accident Investigation . . . 12, which is pedestrians,” and “a forensic mapping class which employs a total station, which is a . . . laser tape measure for measuring scenes.” He denied that accident reconstruction work required any particular certification.

scene.” Lomasney’s counsel objected that the animation constituted cumulative evidence and did “not necessarily depict [to] what the lay witnesses had testified,” and inaccurately showed Wainio’s placement relative to the SUV. Defense counsel added that when the animation began, it inaccurately depicted the SUV’s speed, although he conceded “that’s probably an issue that goes to the weight” of the evidence.

After the prosecutor played the approximately 70-second video, Mathewson reiterated that the animation’s depiction of the drag marks, pillars, and tire marks matched the evidence he had documented at the scene. Mathewson conceded that (1) he had inserted into the animation “two green figures [Woodworth and Wainio] coming out of Kmart,” which did not match trial testimony that Wainio was outside when Woodworth left the store, although he opined that Wainio’s positioning did not affect “the tire marks and the evidence that [he] had measured”; (2) the SUV speed in the animation was slower than Mathewson’s calculations of the SUV’s actual speed; and (3) the animation did not show the car driven by Clyde Barrow, which reportedly had been positioned in front of the SUV and thus would have affected Mathewson’s opinion to some unspecified degree. During the extensive cross-examination by Lomasney’s counsel, Mathewson confirmed that he had reviewed the available witness statements “prior to doing the mathematical equations to determine speed” and preparing the animation, but had not read any of the statements before making his scale drawing. On redirect, Mathewson stated that he had continued to “review[] the witness statements” and his report up through the trial date, but located nothing that would tend to alter his conclusions concerning the SUV’s speed.

The animation had relevance to the accident reconstruction testimony by Mathewson. MRE 401. The animation was not merely cumulative because it depicted Mathewson’s findings and conclusions in a different manner. We thus conclude that the trial court acted within its discretion in admitting the animation. *Surman*, 277 Mich App at 309 (explaining that “an opposing party’s disagreement with an expert’s opinion or interpretation of facts” presents an issue “regarding the weight to be given the testimony, and not its admissibility”).

C. PROSECUTORIAL MISCONDUCT

Next, Lomasney sets forth several prosecutorial misconduct contentions that she did not raise in the trial court. A claim of prosecutorial misconduct is unpreserved “unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (quotation marks and citation omitted). Unpreserved claims of prosecutorial misconduct are, therefore, reviewed for plain error affecting a defendant’s substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Unger*, 278 Mich App at 235 (quotation marks and citation omitted).

This Court “review[s] claims of prosecutorial misconduct case by case . . . to determine whether the defendant received a fair and impartial trial.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). “Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial[,]” *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008), and “need not confine argument to the blandest possible terms,” *People v Dobek*, 274

Mich App 58, 66; 732 NW2d 546 (2007). However, prosecutors may not make statements of fact that are not supported by the evidence. *Stanaway*, 446 Mich at 687. This does not mean that prosecutors are confined to a simple recitation of the testimony itself. Rather, they can “argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case.” *Unger*, 278 Mich App at 236. In addition, “[a] prosecutor’s comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial.” *Dobek*, 274 Mich App at 64.

Lomasney complains that in the following remarks during closing argument, the prosecutor “put before the jury a radical misrepresentation of the accident defense”:

What was the defendant’s state of mind? She drove up on the sidewalk. Why? She struck the concrete pillar with the door of the vehicle, the door that [Wainio] was hanging out of. Did she do it intentionally or was it an accident? Doesn’t make any difference because she knew it happened. She knew that [Wainio] had been struck by this door after she hit the concrete pillar and whether it was an accident or whether she did it on purpose, it does not matter because it still doesn’t change the fact that she knowingly created that scenario, she’s the one who did it. She’s the one who drove him into the pillar. All she had to do was stay stopped. So it doesn’t matter whether it was an accident or it was on purpose or whether she did it to avoid this silver car if it was even there, because it does not change the fact that she knowingly drove him into the pillar when all she had to do was stop.

* * *

[Defendant] Lomasney is guilty of robbery, she used force or violence against [Wainio], and she did it during the . . . course of a larceny and in an attempt to retain possession of the stolen property. What did she do? She used that car as a weapon. She slammed him into the pillar. Whether accidentally or on purpose, it doesn’t matter. She did it. And then she dragged him to his death.

As discussed in section I(A), *supra*, a defendant may face a conviction for felony murder if she acts with the intent to kill, the intent to inflict great bodily harm, *or* if she merely “intentionally set[s] in motion a force likely to cause death or great bodily harm.” *Carines*, 460 Mich at 759. We conclude that the prosecutor correctly summarized the state of the law regarding the felony murder count under the circumstances of this case. *Schutte*, 240 Mich App at 721.

Lomasney further suggests that the prosecutor “undercut the defense on the lesser included offenses by falsely telling the jury that the judge was *required* to instruct on lesser offenses and that it was of no significance that the lesser offense instructions were given in this case.” (Emphasis in original). The record reflects that the prosecutor simply observed that the trial court had to instruct the jury on lesser offenses in this case, which the jury could consider if it wished. We fail to detect any incorrect legal statement in the prosecutor’s observation, and certainly nothing that tended to undercut the jury’s potential consideration of Lomasney’s guilt of a lesser offense. See *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002) (holding that “a requested instruction on a necessarily included lesser offense is proper if the charged

greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it”).

Next, according to Lomasney, the following portion of the prosecutor’s rebuttal argument embodied an appeal to jury sympathy for Wainio:

And yeah, it happened fast. It only took a couple of seconds. [Wainio] bled to death in just those couple of seconds. And that’s all it takes. You won’t see any instruction that says that the prosecution has to prove that she waited X number of seconds before she did it. It can happen in an instant, and it did to her because she stopped and she thought about it. And when Woodworth said go, go, go, she went, went, went, and [Wainio] is dead, dead, dead. And despite the fact that she says that she is only guilty of a lesser offense, [Wainio] is not any less dead. And if she could do something about it, maybe I’d change my mind about whether I thought the evidence proved that she was guilty. And what I think doesn’t matter at all, it’s what you think. But [Wainio] will not be any less dead if you convict her of a lesser offense.

The initial remarks in this paragraph reflect the prosecutor’s proper reference to evidence in the record. *Schutte*, 240 Mich App at 721. The latter remarks appropriately summarize the prosecutor’s theory of the case in light of the trial record. *Id.* Furthermore, the prosecutor’s rebuttal argument properly responded to Lomasney’s attorney’s repeated insistence during his closing argument that the jury should convict her of either manslaughter or negligent homicide, and should not allow sympathy for Wainio to influence its verdict. *Id.*

Additionally, Lomasney characterizes as personal invective the following portion of the prosecutor’s rebuttal argument:

And you cannot accept the fact that [defendant] Lomasney gets on the stand as proof that she’s telling the truth. It’s not. She lied to you on the stand. She told you about her family life, I guess to curry sympathy with you. But she told you that she lost custody of her daughter because of her drug habit. She doesn’t care enough about her daughter to give up drugs? She doesn’t care enough about anybody at that Kmart to not use drugs. She doesn’t care enough about [Wainio] to stop. She doesn’t care enough about anybody driving down any of those streets that she sped along because she has one interest and one interest only, and that is the drugs. And that’s all she cares about.

However, we conclude that the prosecutor properly referenced Lomasney’s testimony to teenage drug addiction and having run away from home, her statement to police that her drug addiction caused her to lose custody of a child, and her concessions that the acquisition of drugs motivated defendants’ theft. *Schutte*, 240 Mich App at 721. Additionally, a prosecutor may argue from facts in evidence that a defendant is not worthy of belief. *Dobek*, 274 Mich App at 67.

Lomasney lastly contends that “[t]he following was a clever vouching by the prosecutor as to his purported personal belief that Lomasney is guilty of murder”:

And I'll leave you with this: When I left for work this morning, my wife wished me good luck. And I said to her, I don't need luck. Not this time. I need jurors who will fairly evaluate the evidence, who will listen to the law as the judge gives it to them, and then I know that those jurors will do the right thing. And the right thing is that they convict this defendant because the evidence proves that she's guilty. . . .

These remarks were a proper invocation of the jury's responsibility to evaluate the evidence and apply the law recited by the trial court. See CJI2d 3.1.

Because none of the prosecutor's challenged arguments were improper, Lomasney's trial counsel also was not ineffective for failing to raise meritless objections to the arguments. *Dunigan*, slip op at 5.

D. CUMULATIVE ERROR

Lomasney avers that the cumulative effect of the errors that infected her trial demand a new trial. "[T]he cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). "Only the unfair prejudice of several *actual* errors can be aggregated to satisfy the standards set forth in" *Carines*, 460 Mich at 763. *LeBlanc*, 465 Mich at 592 n 12 (emphasis in original). Because Lomasney has identified no actual errors that occurred in the course of her trial, we reject her claim of cumulative error. *Werner*, 254 Mich App at 544.

E. SENTENCING

Finally, Lomasney "question[s] whether application of MCL 767.39, which mandates the same sentence for aiding and abetting as for the underlying offense, is consistent with due process in the particular context of first-degree [felony] murder." Her appellate brief references no Michigan case law or other authority tending to support an assertion of a due process violation, effectively abandoning the issue. *People v Portellos*, 298 Mich App 431, 445; 827 NW2d 725 (2012). Furthermore, this Court in *People v Bills*, 53 Mich App 339, 357; 220 NW2d 101 (1974), rejected a defendant's argument "that a mandatory sentence of life imprisonment for felony murder is unconstitutional as cruel and unusual punishment" as applied to an aider and abettor. The Court emphasized the well-settled nature of the proposition "that an aider and abettor may be indicted, tried and on conviction . . . punished as a principal and no denial of due process results from charging an aider and abettor as a principal." *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Mark T. Boonstra